

ORIGINAL

Filed

Supreme Court of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO 5/5/2017 3:49:53 PM

STATE OF NEW MEXICO ex. rel.
THE NEW MEXICO LEGISLATIVE
COUNCIL,

Office of the Clerk


Joey D. Moya

Petitioner,

vs.

No. S-1-SC-36422

THE HON. SUSANA MARTINEZ,
Governor of the State of New Mexico, and
Dorothy "DUFFY" RODRIGUEZ,
Secretary of the New Mexico Department
of Finance and Administration,

Respondents.

On an Original Petition for an
Emergency Writ of Mandamus

**INVITED BRIEF OF THE NEW MEXICO
COUNCIL OF UNIVERSITY PRESIDENTS,
*AMICUS CURIAE***

SUPREME COURT OF NEW MEXICO
FILED

MAY - 5 2017



Kevin Washburn
Regents Professor
UNM School of Law
1117 Stanford, NE
MSC 11 6070
Albuquerque, NM 87131-0001
(505) 277-3304
washburn@law.unm.edu

Pro Bono Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
INTEREST OF AMICI.....	1
INTRODUCTION	3
DISCUSSION	4
I. THE THREAT TO PUBLIC HEALTH IN NEW MEXICO.....	4
II. THE THREAT TO STUDENT SUCCESS AT NM HIGHER EDUCATION INSTITUTIONS.....	7
III. THE DISRUPTION OF RECRUITMENT AND RETENTION OF STUDENTS, FACULTY AND MEDICAL STAFF.	11
IV. THE ACUTE BUDGET UNCERTAINTY HAS CAUSED OTHER PROBLEMS FOR HIGHER EDUCATION.....	16
CONCLUSION.....	19
CERTIFICATE OF SERVICE	20

Interest of Amici

This brief is responsive to a request made *sua sponte* by this Court's Order of April 24, 2017. The Council of University Presidents ("Council" or "CUP") is an organization composed of the leadership of seven of New Mexico's public colleges and universities, including the University of New Mexico (hereinafter "UNM"), New Mexico State University ("NMSU"), Eastern New Mexico University ("Eastern"), Western New Mexico University ("Western"), Northern New Mexico College ("Northern"), New Mexico Institute of Mining and Technology ("Tech") and New Mexico Highlands University ("Highlands"). Amici share an interest in the education of students, economic development in New Mexico, and research and public service to the State of New Mexico.¹ Collectively, the Council and these institutions will be called "Amici."

Each of the Amici member institutions are state educational institutions with independent constitutional status recognized in Article XII, Section 11 of the New Mexico Constitution. Thus, they are independent constitutional actors in carrying out their duties to student, faculty and the communities that they serve.

¹ As required by Rule 12-320(C), NMRA 2017, counsel for Amicus Council of University Presidents (CUP) states that no counsel for any party authored this brief in whole or in part, nor did any counsel or party make a monetary contribution intended to fund the preparation or submission of this brief. Undersigned counsel is handling the case on a pro bono basis. For more information about CUP, see the Council's web site: <http://nmcup.us/index.html>.

Together, Amici employ approximately 4,500 faculty and more than 10,000 support staff, serving nearly 60,000 students, the vast majority of whom are New Mexicans. The CUP institutions have a broad footprint within the state, with branches of UNM in Albuquerque, Gallup, Los Alamos, Valencia County and Taos, branches of NMSU in Las Cruces, Alamogordo, Carlsbad, Grants, Dona Ana Community College, Highlands in Las Vegas, Western in Silver City, branches of Eastern in Portales, Roswell and Ruidoso, Tech in Socorro, and Northern in Espanola and El Rito.

The issues discussed herein also critically affect other important educational institutions throughout the state, including the Santa Fe Community College, Mesalands Community College in Tucumcari, Clovis Community College, Central New Mexico College in Albuquerque, the New Mexico Military Institute in Roswell, the New Mexico School for the Blind and Visually Impaired in Alamogordo, and the New Mexico School for the Deaf in Santa Fe. In total, the issues discussed herein affect thousands of additional faculty and staff and a total of approximately 130,000 students enrolled across the state, including nearly 60,000 in four-year institutions and more than 70,000 in two-year institutions.

Like the Amici, some of these other institutions also possess independent constitutional status in New Mexico under Article XII, Section 11 of the Constitution.

The mission of higher education in New Mexico is broad and exceedingly important. This mission is, in part, to produce an educated workforce that serves New Mexico's public health and economic growth with special concern for the fact that New Mexico routinely suffers among the highest poverty and unemployment rates in the United States.

Introduction

At the end of this year's 60-day legislative session that began in January of 2017, the Legislature succeeded in enacting a difficult budget compromise bill that involved painful cuts to several areas of state government, including higher education. In the Legislature's budget, higher education was cut approximately one percent from the previous year's original budget, which was compounded by a five percent appropriation reduction in October 2016. The total amount appropriated by the Legislature was roughly \$744 million and ultimately was within \$50,000 of the amount originally proposed by the Governor. Affidavit of David Abbey, Exhibit D of Exhibits in Support of Verified Emergency Petition for Original Writ of Mandamus, filed April 21, 2017 (hereinafter, "Petitioner's Exhibits").

Higher education in New Mexico has endured significant cuts in recent years. The budget enacted by the Legislature in March provides state higher education institutions roughly \$50 million *less than* higher education received in FY 2008, despite the fact that healthcare, construction, and other costs have risen dramatically

in the past ten years (the number of students enrolled in higher education in New Mexico is nearly identical today as to what it was in 2008). In sum, higher education in New Mexico has worked hard to accomplish more with less. Indeed, the number of degrees awarded in the last five years has increased by 16.4%.

On April 7, 2017, the Governor exercised an extraordinary line-item veto of portions of the Fiscal Year 2018 appropriation bill eliminating all funding for the Legislature and for higher education in New Mexico. Governor's House Executive Message No. 56 (April 7, 2017), Petitioner's Exhibit D, at 3-7.

Amici have a fiduciary responsibility to their institutions to advocate for a resolution quickly to mitigate the many harms caused by this budget crisis. CUP takes no position on the outcome of this action, but Amici do request that this case be decided expeditiously so that other constitutional actors do not waste time wondering what the Court will do.

Discussion

I. The Threat to Public Health in New Mexico.

While the impact of the line-item vetoes on the core mission of higher education in the state is severe, perhaps the most serious impacts of the vetoes are their harm to public health in New Mexico. The line-item vetoes drew a meticulous line through more than \$1 million in funding for pediatric oncology, nearly \$5 million for the Carrie Tingley Hospital, more than \$3 million for UNM's newborn

intensive care unit (NICU), more than \$6.6 million for the Children's Psychiatric Hospital and nearly \$2.5 million for the UNM Cancer Center. General Appropriation Act, line-item vetoes, p. 140, line 24-25, p. 141, lines 1-3, 8 (Petitioner's Exhibit B).

For a child with cancer, or for a mother with a premature newborn fighting for life in the NICU, or for any patient battling cancer at the UNM Cancer Center, funding for these important medical programs is literally a matter of life and death.

The budget uncertainty spawned by the vetoes has a very real impact on the lives of some of the most vulnerable citizens of New Mexico. The doctors and healthcare professionals charged with caring for them face significant and ongoing uncertainty about what will come on July 1. Staffing and recruitment is already suffering. Medical administrators must be cautious about filling vital openings because of uncertainty as to whether funding will continue. The fiscal uncertainty causes stress. For the patients facing the challenges of these health conditions and the medical providers serving them, this stress is unnecessary and unproductive.

The vetoes also covered several other important medical and public health initiatives. For example, New Mexico faces a nursing shortage, particularly in rural areas.² The vetoes eliminated funding for several nurse training programs across the state. *See* Petitioner's Exhibit B, General Appropriation Act, line-item vetoes, p. 141,

² See Rasheed Mahmood, Nursing Numbers: New Mexico's Nursing Shortage (Aug. 26, 2015), <http://publichealthnm.org/2015/08/26/nursing-numbers-new-mexicos-nurse-shortage/>.

line 17 (UNM), p. 145, lines 22-23 (NMSU), p. 146, lines 16-17 and 20-21 (NMSU-Carlsbad and Dona Ana), & p. 147, line 23 (Highlands). The veto thus disrupts a vital supply line for medical professionals at a time when the state is facing significant challenges in meeting the needs of its population.

The Office of the Medical Investigator (OMI), whose budget was cut by \$4.7 million by a line-item veto, is responsible for investigating deaths statewide that are sudden, suspicious, violent, unnatural or unattended. These investigations require visits to death scenes by trained investigators, autopsies by forensic pathologists, and laboratory testing and x-rays interpreted by pathologists and radiologists. OMI's work is vital for both law enforcement officers and grieving families, as well as public health and epidemiologic prevention and intervention efforts. In part because of the strength of OMI, the forensic pathology program at UNM is among the most prestigious in the country and an important training ground for pathologists in New Mexico.

Past budget cuts and the ongoing uncertainty have already taken a toll. OMI has decided not to fill a pathology fellowship position for FY 2018. Moreover, OMI has recently completed a rebuild of faculty and staff after a period of transition. Not having an appropriation sows a fear among staff that jeopardizes this new stability. The effect on public safety at a time when some parts of the state are battling an epidemic in crime is negative and significant.

Without an appropriation, OMI would be forced to reduce operations by more than 50%, significantly delaying the solace to families seeking answers, to law enforcement officers investigating crimes, and to public health officials seeking to stem outbreaks of serious illnesses.

In sum, the budget uncertainty faced by higher education has an outsized influence on the public health. Many of the programs affected are vital to the health and welfare of New Mexicans.

II. The Threat to Student Success at NM Higher Education Institutions

The primary mission of higher education is, of course, to help students achieve educational goals that will provide them personal fulfillment and allow them to become more productive members of society. In New Mexico, keeping students in school has been a significant challenge to our institutions of higher learning. In part due to the high number of first-generation college students and high rates of poverty, staying in school long enough to complete a degree is a significant challenge for many of our students.

In recent years, New Mexico's colleges and universities have made significant commitments to student retention, success, and, ultimately, graduation. A common metric of student "persistence" measures the number of entering full-time freshmen students who return the following fall. For freshmen entering UNM in the fall of

2015, more than 80 percent of them returned in the fall of 2016, a historical high.³ For new graduate program students at UNM, a record high was also achieved, of roughly 90 percent of 2015 grad students returning in 2016.

NMSU is investing major resources and also seeing significant success. NMSU has developed a program that provides every first year student with a "Student Success Navigator," who advises the students on study habits, tutoring services, and support services such as the Writing Center and the Math Success Center. These navigators intervene when students show signs of distress, such as not attending classes, not logging in to their NMSU university online account, or doing poorly at the seven week mark of the semester. As a result of this initiative and others, such as mid-term reporting of grades in 100 and 200 level courses, the retention of first year students at NMSU from the fall semester to the spring semester this past year was at the highest level in a decade. This success in improving student retention faces serious risk as students uncertain about the future of higher education in New Mexico decide to enroll elsewhere, such as at Texas Tech or UTEP, in order to ensure that they can continue with their studies.

The six-year student graduation rate, another common national measure of institutional success, has trended generally upward over the last five years at NMSU,

³ UNM Division of Enrollment Management, Retention Progress Data, available at <http://em.unm.edu/dashboard/pr-retention.html>.

Highlands, Eastern and Western. Moreover, NM Tech has held steady with the highest six-year graduation rate in the state at nearly 50 percent.⁴ At UNM, more than 48 percent of the freshman entering class of 2009 graduated within six years, reflecting the culmination of very successful efforts to improve 4, 5, and 6 year graduation rates. While these statistics have not improved every year, the Amici have worked hard to develop positive momentum and each institution has been very attentive to student needs. Budget uncertainty undermines these efforts.

Improving student retention is challenging and the gains are fragile. It is the experience of the Amici institutions that students struggling to stay in school and complete degrees are easily knocked off-track and easily discouraged. The positive momentum in recent years has been hard won and is easily lost.

The vetoes have caused widespread uncertainty that has impacted students negatively. For example, an academic leader at Highlands publicly reported that a student asked him whether the university would be open in the fall.⁵ Another student asked if she should transfer to an out-of-state school to finish her degree.

⁴ See Council of University Presidents Performance Effectiveness Report (November 2016).

⁵ Sam Minner, Another Perspective: Stopping Higher Education Funds Wrong Move, Las Vegas Optic, April 21, 2017, available online at <http://www.lasvegasoptic.com/content/another-perspective-stopping-higher-ed-funds-wrong-move>

At NMSU, student registration for the fall semester began inauspiciously on April 7, the same day as the line-item vetoes of the Legislature's higher education funding. One student retention strategy is a program in which students who have not registered are called to encourage them to continue at NMSU in the summer and fall. One of the callers has reported that roughly 5% to 10% of the unregistered students cite the lack of a budget as a reason why they are declining to register.

The vetoes have wreaked havoc on the ability of higher education institutions and their students to engage in rational planning for the fall semester. At Northern, for example, the school seeks, as a matter of good practice and good planning, to register at least 50 percent of the incoming students prior to commencement. This year, early registration at some schools has been delayed due to budget uncertainty. At a recent student forum at Northern, students questioned whether the college would survive the budget crisis. Their questions reflect a broader existential concern that has created anxiety among the students and undermined their confidence in the institution. The chance of students falling through the cracks is greater when students are not pre-registered and when they are not confident in the institution's stability. It is very difficult for higher education to succeed under such circumstances.

Some of the damage caused by the vetoes is irreparable; some students have already been discouraged. However, quick action to resolve the budget impasse could restore public and student confidence in the fiscal security of our state's

educational institutions. It would reassure students that funding will be available and adequate to conduct educational programming next fall at a cost to students similar to the cost in the current year.

III. The Disruption of Recruitment and Retention of Students, Faculty and Medical Staff.

Educational institutions and teaching hospitals are living organisms that must constantly recruit new faculty, staff and students to remain healthy. Just as existing students can easily be discouraged in their path to graduation, candidates considering a New Mexico college or university during a time of uncertainty may choose instead a school outside New Mexico or decline to seek higher education at all. The risk in such a scenario is the loss of the brightest New Mexicans to out-of-state schools, creating "brain drain" from New Mexico, and likewise a loss of promising out-of-state students who might bring their talents to New Mexico for higher education. Similar effects occur for potential faculty and medical staff working at New Mexico institutions.

The line-item vetoes of higher education made national headlines, including the Washington Post, the Chronicle of Higher Education, and the New York Times.⁶

⁶ Valerie Strauss, *New Mexico Gov. Martinez vetoes higher education funding*. *All of it*, Washington Post, April 17, 2017; Chris Quintana, *The Next Higher-Ed Funding Battle to Watch May Be in New Mexico*, The Chronicle of Higher Education, April 19, 2017; Associated Press, *New Mexico Legislature Sues Governor in Escalating Conflict*, The New York Times, April 21, 2017.

The issue has also been covered extensively in the local press. As a result, prospective students from New Mexico and all over the United States have been exposed to the news.

For most schools, the budget uncertainty could not have come at a worse time for recruitment efforts. Late spring is peak recruiting time for students, faculty and staff for programs beginning in the fall. Indeed, because most faculty work on nine-month contracts and academic year runs from August through May, faculty candidate recruitment is usually completed in May, and most student recruitment occurs before the summer begins. As faculty members conclude the spring semester in early May, they know not what they face in August.

The UNM School of Law, for example, begins sending acceptance letters to admitted applicants in the spring semester and seeks to have its entering class for the coming fall identified by early May. The peak month for the receipt of deposits for seats in the fall entering class is April each year. The School of Law competes with out-of-state schools for the best New Mexicans and non-residents. The budget uncertainty caused by the lack of a budget is likely to cause the School of Law to lose candidates to other schools. Indeed, at the School of Law, seat deposits for the entering law school class were down from 125 in late April of 2016 to approximately 100 in late April 2017.

Likewise, the UNM College of Pharmacy has received inquiries from several students regarding the potential impact of the vetoes, including questions as to whether school will continue next year and, if so, the impact on tuition. Several offers to prospective students remain outstanding within the College of Pharmacy and there is significant concern that fewer students will matriculate in light of the fiscal situation. For Pharmacy, recruitment season for the 2018-2019 class begins shortly and if the budget situation is not resolved, the Colleges are concerned it will affect their ability to recruit students. In sum, the stress is escalating as the budget uncertainty continues.

The impact of the lack of budget on faculty recruitment and retention is even more profound. For students, school is temporary. For many faculty, on the other hand, the choice of where to begin or continue one's career is often a lifetime decision. A state's commitment to higher education, or lack thereof, is always a general concern for a faculty member making a career choice, but the line-item vetoes have provided a tangible reason for much more acute concern. Moreover, faculty members are even more likely than students to have read and digested the national and local media stories.

Faculty members who are considering New Mexico colleges and universities are having second thoughts, and retention of existing students has become a serious issue. The NMSU College of Engineering had a top faculty candidate withdraw due

to the current budget situation. Highlands reported the loss of a key faculty member who had been entertaining an outside offer when the vetoes occurred. University leaders are learning of faculty looking for opportunities outside New Mexico. A concern in higher education leadership is that these known instances are only the tip of the iceberg. In the UNM Provost's Office, numerous senior administrators, most of whom were drawn from the faculty, have recently announced plans to leave the state for opportunities elsewhere. It is very difficult to recruit high quality replacements under such circumstances.

In the medical field, turnover is high because the demand for excellent healthcare professionals is acute. The need for strong recruitment within and beyond the state is crucial to meet our communities' needs.

A bright spot in New Mexico has been the UNM Cancer Center, which has diagnosed and treated an increasing number of cancer patients each year. The Cancer Center has developed important new clinical programs that are crucial to New Mexico, such as a Women's Cancer Center, the state's only program for bone marrow transplant and other similar therapies, the State's only initiative focusing on new cancer immunotherapies and cell-based therapies, and a new program for Adolescent and Young Adult Oncology. In light of the growth in cancer research opportunities, the Center has been seeking to recruit 18 new cancer physicians and scientists. Active recruitments are underway and many new outstanding physicians

and scientists have visited New Mexico to consider new positions. Several candidates have mentioned significant concerns over the Cancer Center's financial stability and state support in light of recent actions.

In the Department of Pediatrics, two long-term faculty are searching for positions out of state due to concerns about funding instability. This year alone, the Department of Pediatrics has already lost eight faculty. Three positions are currently open and difficult to fill because of perceptions that the state is unwilling to invest in the institution.

Likewise, in the UNM College of Nursing, a few key departures occurred prior to the vetoes, but the UNM College of Nursing faces sudden difficulty recruiting faculty; top candidates being interviewed for positions have cited the line-item vetoes with concern.

New Mexico's colleges and universities operate in a competitive environment for faculty and student talent. Current faculty are being targeted and actively recruited by competing academic centers that are aware of the veto and are capitalizing on the perceived instability and uncertainty in New Mexico. The budget uncertainty makes Amici institution faculty more subject to poaching. Neighboring states are taking advantage of perceived instability in higher education in New Mexico to recruit faculty and students, into both their on campus and online programs.

Fiscal stability is crucial to the colleges and universities and the medical profession in New Mexico.

IV. The Acute Budget Uncertainty Has Caused Other Problems for Higher Education

The uncertainty spawned by the line-item vetoes has also caused serious problems related to accreditation and financing.

The budget crisis is a significant problem for our colleges and universities currently facing accreditation reviews, which are top-to-bottom institutional reviews that occur at regular intervals spaced five to ten years apart. Accreditation reviews are designed to insure that colleges and universities are meeting current "best practices" and are working toward constant improvement across a range of criteria.

The vetoes came at a particularly bad time for NMSU. NMSU will be visited by an accreditation review team from the Higher Learning Commission (HLC) in the fall of 2017. One of the most important criteria for accreditation addresses the financial stability of the institution. To retain accreditation, NMSU must prove that the "institution's resources, structures, and processes are sufficient to fulfill its mission, improve the quality of its educational offerings, and respond to future challenges and opportunities."⁷ The HLC's review is designed to ensure students

⁷ See generally Higher Learning Commission Criteria for Accreditation, <https://www.hlcommission.org/Criteria-Eligibility-and-Candidacy/criteria-and-core-components.html>.

that a university has adequate budgetary planning and sufficient financial resources that any student who begins a degree program at the institution can complete that degree program in 4 to 6 years. The vetoes place a cloud over the financial viability of NMSU. Financial concerns by the HLC could jeopardize the continuing accreditation of a university.

UNM and Highlands are also in the midst of an accreditation review by the same agency. Loss of accreditation is not a hypothetical threat. Highlands was placed on probation by the HLC in the fall of 2016 and has been working hard since that time to meet the HLC's rigorous criteria. In the meantime, Highlands is warning its own students interested in pursuing a higher degree at another school or transferring to ascertain whether the other school will accept the credit from a school on probation.⁸ In sum, the risks related to accreditation are real and deeply concerning, and the risks reach both institutions and students.

Another significant problem relates to school finances. Like many public entities, New Mexico's colleges and universities finance important initiatives, primarily related to capital construction projects, through bond financing to borrow more cheaply. These schools immediately face higher borrowing costs due to the uncertainty caused by the vetoes of the legislative budget.

⁸ See, e.g., <http://www.nmhu.edu/institutional-research/highlands-university-accreditations/#probation>

Bond rating agencies are monitoring the State budget situation very closely. NMSU was recently questioned by a rating agency about the elimination of higher education funding and NMSU's plan going forward. During the fall of 2016, rating agencies Moody's and Fitch revised their outlooks for bonds from NMSU downward from "Stable" to "Negative." Such action can force a university to pay a higher interest rate to convince buyers to purchase the bonds.

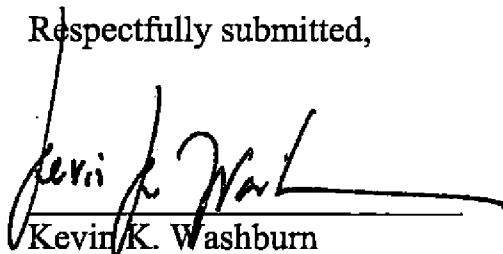
The timing of the vetoes was especially problematic because it came on the heels of a new bond initiative at NMSU. During March 2017, NMSU initiated the process to issue up to \$85 million in bonds. The financing schedule includes bond rating calls in May of 2017 with marketing of the bonds in June. Unless addressed quickly, the vetoes of all funding for NMSU and the ensuing uncertainty related to the FY18 budget for the State could negatively impact the bond rating and investor's confidence in NMSU. If this issue is not resolved by mid-June, NMSU will likely be forced to pay a higher interest rate on issued bonds, forcing NMSU to shift revenues from more productive uses toward service of debt.

In sum, the current uncertainty has a tangible negative economic impact, affecting NMSU and its students, and other institutions with similar initiatives. This problem can be addressed with expeditious resolution of the current fiscal crisis.

Conclusion

The fiscal uncertainty is having a serious negative impact on higher education and public health in New Mexico. Amici are not interested in casting blame on any particular actor, but in obtaining solutions to the fiscal crisis that has developed. Thus, Amici take no position on the propriety of any particular relief before this Court. However, Amici have a firm conviction that the corrosive uncertainty is beginning to cause long term damage to New Mexico's higher education institutions. Whether or not the Supreme Court ultimately decides to grant the relief sought by the Petitioners, Amici respectfully ask the Court to move expeditiously to assure that the issue is resolved as quickly as possible, in part, so that other constitutional actors do not wait and wonder what the Court will do.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin K. Washburn", is written over a horizontal line.

Kevin K. Washburn
Regents Professor
UNM School of Law
1117 Stanford, NE
MSC 11 6070
Albuquerque, NM 87131-0001
(505) 277-3304
washburn@law.unm.edu

Pro Bono Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2017, a copy of the foregoing Invited Brief of the New Mexico Council of University Presidents, *Amicus Curiae*, has been served by hand delivery to the office of the Petitioners, Respondents and the Attorney General, as follows:

Paul J. Kennedy
Arne R. Leonard
201 12th Street, N.W.
Albuquerque, New Mexico 87102
pkennedy@paulkennedylaw.com
aleonard@paulkennedylaw.com

Michael Browde
browde@law.unm.edu
1117 Stanford, N.E.
MSC 11 6070
Albuquerque, NM 87131-0001

Steven Blankinship
Matthew J. Stackpole
General Counsel
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87501-2704
Steven.Blankinship@state.nm.us
Matthew.Stackpole@state.nm.us

Office of the Secretary of Finance and
Administration
Bataan Memorial Building
407 Galisteo Street, #166
Santa Fe, NM 87501

Office of the Attorney General
408 Galisteo Street
Santa Fe, NM 87501

Jane B. Yohalem
jbyohalem@gmail.com
309 Johnson St. 87501
P.O. Box 2827
Santa Fe, NM 87504-2827